

SERVED: March 19, 1992

NTSB Order No. EA-3516

**UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D.C.**

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D. C.  
on the 5th day Of March, 1992

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BARRY LAMBERT HARRIS,  
Acting Administrator,  
Federal Aviation Administration

Complainant,

v.

Docket SE-9739

JOHN DOE,<sup>1</sup>

Respondent.

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OPINION AND ORDER

Respondent has appealed from a written initial decision issued by Administrative Law Judge Jerrell R. Davis on June 29, 1989, following a hearing in the above-captioned matter held on June 23., 1989.<sup>2</sup> By that decision, the law judge both denied a motion by respondent to dismiss the complaint and affirmed the Administrator's revocation of respondent's airline transport

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<sup>1</sup>For reasons fully set forth in the initial decision (I.D. at 1, n.1), respondent in this case will be referred to as "John Doe," rather than by his actual name.

<sup>2</sup>A copy of the law judge's initial decision is attached.

pilot (ATP) rating for his alleged failure comply with the good moral character requirement for ATP certificate holders set forth in section 61.151(b) of the Federal Aviation Regulations ("FAR," Part 61).<sup>3</sup> The Administrator's action followed respondent's conviction on charges of various felonious sexual offenses, for which he was sentenced to eight years' imprisonment.

In this case, a bifurcated hearing had been scheduled and respondent's motion to dismiss was submitted following the presentation of the Administrator's case-in-chief at the conclusion of the hearing's first session. At that point, the law judge adjourned the hearing in order to consider that motion. He subsequently issued his initial decision, in which he disposed of both the motion and the merits of the case, indicating that he had found it "unnecessary" to resume the-hearing in order to receive further evidence "on the issue of sanction."<sup>4</sup>

In his appeal brief, respondent contends that the law judge should have granted his motion to dismiss the Administrator's complaint, and he advances several arguments in support of that position. Among these is the assertion that the revocation of his ATP rating violates constitutional due process principles

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<sup>3</sup>FAR § 61.151(b) provides as follows:

"§ 61.151 Eligibility requirements: General.

To be eligible for an airline transport pilot certificate, a person must--

\* \* \* \*

(b) Be of good moral character. "

<sup>4</sup>I.D. at 6.

because no nexus between the criminal conduct involved and the performance of his functions as a pilot was shown. Respondent also maintains that the good moral character requirement set forth in FAR section 61.151(b) is not "necessary to assure safety in air commerce," and, therefore, impermissible exceeds the scope of the statutory provision dealing with the issuance and denial of airman certificates.<sup>5</sup> In addition, he asserts that the good moral character standard appearing in the regulation is unconstitutionally vague. Respondent has also posited that his criminal misconduct was not sufficiently egregious to require the revocation of his ATP rating under FAR section 61.151(b). Finally, respondent contends that the law judge's issuance of a decision on the merits of the case without resuming the hearing deprived him of procedural due process.<sup>6</sup>

In addressing these contentions, we note at the outset that the applicability of FAR section 61.151(b) has been challenged on various constitutional grounds. Such constitutional questions are not, however, within the Board's adjudicatory authority,<sup>7</sup> and will not, therefore, be considered herein.<sup>8</sup> In addition,

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<sup>5</sup>49 U.S.C. § 1422(b).

<sup>6</sup>A reply brief has been submitted by the Administrator.

<sup>7</sup>See, e.g., Administrator v. Lloyd, 1 NTSB 1826, 1828 (1972); Administrator v. Weiser, 2 NTSB 2335, 2337 (1976).

<sup>8</sup>We do note, as to the assertion that revocation of ATP certification under FAR § 62.151(b) is impermissible in the absence of a demonstrated relationship between the misconduct in question and one's abilities as a pilot, that our predecessor agency, the Civil Aeronautics Board, essentially rejected such a theory long ago in Administrator v. Roe, 45 CAB 969, 972 (1966).

the Board must reject respondent's suggestion that the Administrator failed to make a prima facie showing that the misconduct involved provided a valid basis for the revocation of his ATP rating under FAR section 61.151 (b) . In this regard, we believe that, by offering proof of respondent's conviction of the criminal offenses in question, the Administrator established a prima facie case in support of his allegation that respondent lacks the good moral character required of an ATP certificate holder. Consequently, we find that the law judge did not err in denying respondent's motion to dismiss the complaint,<sup>9</sup> and we will, therefore, deny his appeal from that portion of the initial decision.

However, the Board is of the opinion that the remainder of respondent's appeal is well-founded. In this regard, we believe that, by rendering a decision on the merits without first affording respondent an opportunity to present evidence in his own behalf, the law judge deprived respondent of a full and fair hearing.<sup>10</sup> Such action is violative of respondent's fundamental right to procedural due process and runs afoul of both the Administrative Procedure Act<sup>11</sup> and the Board's Rules of

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<sup>9</sup>See, e.g., Administrator v. Davis and Manecke, 1 NTSB 1517, 1520-21 (1971); Administrator v. Arroyo, NTSB Order EA-2519 at 5 (1987 ); Administrator v. Reiss, NTSB Order EA-3305 at 7 (1991).

<sup>10</sup>In this vein, we note that respondent, through counsel, had specifically expressed a desire to present his case in the event that his motion to dismiss was denied. Tr. 58.

<sup>11</sup>See 5 U.S.C. § 556(d).

Procedure.<sup>12</sup> We will, therefore, grant respondent's appeal from that portion of the initial decision which disposes of the case on the merits and remand the case to the law judge for further adjudicatory action.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal from that portion of the initial decision denying his motion to dismiss the Administrator's complaint is denied, the law judge's ruling on the motion to dismiss is sustained, and, to that extent, the initial decision is affirmed;
2. Respondent's appeal from that portion of the initial decision sustaining the Administrator's revocation of his ATP rating is granted on the basis that such a determination was premature, and, to that extent, the initial decision is reversed; and
3. This case is remanded to the law judge for further adjudicatory action.

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

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<sup>12</sup>See 49 C.F.R. § 821.38.